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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

SEATTLE TIMES COMPANY,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON,

Defendant.

NO:

COMPLAINT FOR DISCLOSURE
UNDER THE PUBLIC RECORDS ACT

INTRODUCTION

To save the fall 2020 sports season, the Pac-12 Conference partnered with Quidel Corporation to administer rapid-result COVID-19 tests to athletes. Dr. Kim Harmon, sports medicine chief at the University of Washington (UW), was involved in arranging and announcing the partnership. The Seattle Times made a public records request for Dr. Harmon's emails mentioning Quidel. The UW claimed it could not find any of the requested emails, closed the request, and denied an administrative appeal of the closure. In doing so, the UW violated the Public Records Act (PRA), Chapter 42.56 RCW.

1 Responsive records existed. The Seattle Times independently obtained some of them from
2 Oregon State University, which had similar involvement in the Quidel partnership. The UW should
3 have produced those records, and any similarly relevant records, directly to the Times. Its failure
4 to do so shows a lack of diligence and thoroughness in the UW's response to the Times request.

5 The Seattle Times brings this action to compel the UW to search for and produce all
6 requested records in compliance with the PRA. The Times also seeks reasonable attorney fees and,
7 to deter future violations, an award of penalties as authorized by RCW 42.56.550.

8 I. JURISDICTION AND VENUE

9 1.1 The University of Washington's main campus is in Seattle in King County, Washington.
10 The sports medicine section of the UW Department of Family Medicine is in Seattle. The public
11 records at issue are maintained by the UW in Seattle.

12 1.2 This Court has jurisdiction pursuant to RCW 42.56.550(1). Venue lies in this court
13 pursuant to RCW 4.92.010(1), RCW 4.92.010(2), RCW 4.12.025(1) and RCW 42.56.550(1).

14 II. PARTIES

15 2.1 The Seattle Times is the state's largest newspaper. It is an independent family-owned
16 company known for its commitment to investigative reporting. Reporter Mike Reicher requested
17 the records at issue on behalf of the Times.

18 2.2 The University of Washington is the state's largest institution of higher education with a
19 total budget of \$8.25 billion in fiscal year 2020. It is an agency as defined by RCW 42.56.010(1).
20 The UW has more than 59,000 students and more than 31,000 employees.

21 III. BACKGROUND FACTS

22 3.1 On August 11, 2020, the Pac-12 Conference decided to postpone all sports competition
23 through the end of 2020 due to COVID-19 safety concerns.

1 3.2 Dr. Kim Harmon, chief of the UW's sports medicine section, and Dr. Doug Aukerman at
2 Oregon State University (OSU) led the Pac-12 Conference's medical advisory team. They
3 communicated with Quidel Corporation about a rapid-testing partnership.

4 3.3 On September 3, 2020, the Pac-12 Conference announced a partnership with Quidel to
5 provide up to 15,000 coronavirus tests per week to student athletes in football and other contact
6 sports. Dr. Harmon was quoted in the Pac-12 press release as follows:

7 This is an opportunity to get our athletes back to activity in a careful and
8 controlled manner while monitoring outcomes. It is win-win for athletics and to
9 better our understanding of strategies to prevent spread during sports.¹

10 3.4 The Pac-12 Conference posted a video of Dr. Harmon, headlined "Dr. Kim Harmon
11 discusses Pac-12 work leading to new COVID-19 testing partnership," on its web site.² In the
12 video she said "we've had some very heated and interesting arguments" and ultimately
13 approached the testing from the perspective of student athletes. She continued:

14 I can go to sleep at night with the way that we approached this. That when we
15 thought it was too dangerous, we said, 'you know what, it looks too dangerous,
16 there's too much we don't know.' And you know, now we see a path forward and
17 we're moving forward. So I am really impressed with how the Pac-12 has handled
18 this.

19 IV. RECORDS REQUEST

20 4.1 On September 30, 2020, investigative reporter Mike Reicher sent an email to the UW
21 public records officer at pubrec@uw.edu with the subject line: "Seattle Times Public Records
22 Request." The email said:

23 Pursuant to the Public Disclosure Act, RCW 42.56, I request to inspect and obtain
24 a copy of the following records, which I understand are held by your agency:

25 ¹ See [Pac-12 Conference announces groundbreaking testing research initiative with Quidel; Rapid-results test could speed the return of sport competitions | Pac-12 \(pac-12.com\)](#).

26 ² The video can be found here: [Dr. Kim Harmon discusses Pac-12 work leading to new COVID-19 testing partnership | Pac-12 \(pac-12.com\)](#) (accessed December 28, 2020).

1 -Email messages sent or received by Dr. Kim Harmon in the Sports
2 Medicine department that include the word "Quidel" and were sent or received
3 between Aug. 24 and Sep. 4, 2020. Include all attachments.

4 -Any recorded online meetings or webinars attended by Dr. Harmon in
5 which coronavirus antigen testing was discussed, between Aug. 24 and Sep. 4,
6 2020. An example would be a recording of a Zoom meeting.

7 Feel free to call or email with any questions.

8 4.2 On October 7, 2020, UW records officer Perry Tapper emailed the following response to
9 Mr. Reicher at The Seattle Times:

10 Re: Public Records Request PR-2020-00687

11 Dear Mr. Reicher:

12 This email is to acknowledge receipt of your public records request and to provide
13 the University's response.

14 The University is unable to identify any records responsive to your public records
15 request, in which you requested specific correspondence of Dr. Kim Harmon.

16 This concludes the University's response to your public records request, as
17 required by RCW 42.56.520. Please feel free to contact this office should you
18 have any further questions.

19 4.3 On October 17, 2020, Mr. Reicher wrote to Mr. Tapper: "Thank you for the reply. Could
20 you please let me know which email accounts you searched?"

21 4.4 Two days later Mr. Tapper responded to the reporter as follows:

22 Mike,

23 Our office does not conduct searches of records. That is the responsibility of the
24 departments to which potential custodians report. We sent search requests to UW
25 Medicine, the School of Medicine, and Intercollegiate Athletics. All departments
26 returned a response of no records. Hence the final response provided below.

Please let me know if you have any further questions or concerns.

4.5 Later that day, Mr. Reicher appealed the denial administratively. He wrote:

1 Perry,

2 Thank you for the reply. This email is a formal appeal to the University of
3 Washington's determination that no records exist pursuant to my Sep. 30, 2020
4 request for records related to Dr. Kim Harmon and Quidel.

5 The university's no-records response defies common sense, as Dr. Harmon – in
6 her official capacity as the University of Washington section head of sports
7 medicine – has been closely working on the Quidel testing strategy, as evidenced
8 in news and information clips online. Here are just a few examples:

9 **Dr. Kim Harmon discusses Pac-12 work leading to new COVID-19 testing
10 partnership**

11 [https://pac-12.com/videos/dr-kim-harmon-discusses-pac-12-work-leading-new-
12 covid-19-testing-partnership](https://pac-12.com/videos/dr-kim-harmon-discusses-pac-12-work-leading-new-covid-19-testing-partnership)

13 **Quidel's antigen tests saved Pac-12 football: A deep dive into the origin of
14 their relationship**

15 [https://www.mercurynews.com/2020/09/23/quidels-antigen-tests-saved-pac-12-
16 football-a-deep-dive-into-the-origin-of-their-relationship/](https://www.mercurynews.com/2020/09/23/quidels-antigen-tests-saved-pac-12-football-a-deep-dive-into-the-origin-of-their-relationship/)

17 **Pac-12 partners with Quidel for rapid COVID-19 testing of athletes**

18 [http://www.uscannenbergmedia.com/2020/09/03/pac-12-partners-with-quidel-for-
19 rapid-covid-19-testing-of-athletes/](http://www.uscannenbergmedia.com/2020/09/03/pac-12-partners-with-quidel-for-rapid-covid-19-testing-of-athletes/)

20 Please ask the departments to re-check their records and explain their search
21 parameters.

22 Sincerely,

23 Mike

24 4.6 On October 29, 2020, Mr. Reicher received a letter from UW hearing officer Ann
25 Anderson denying his appeal. The letter said searches were conducted by the Intercollegiate
26 Athletics Department, the School of Medicine and UW Medicine "including Dr. Harmon." The
letter reiterated that no responsive records were found. Search parameters were not explained.

27 **V. RESPONSIVE RECORDS**

28 5.1 At the same time he submitted the UW request, Mr. Reicher sent a similar records request
29 to OSU pursuant to Oregon's public records law. The Times reporter sought emails that include

1 the word “Quidel” and that were sent or received by Dr. Aukerman between August 24 and
2 September 4, 2020.

3 5.2 Unlike the UW, the Oregon school provided a batch of responsive records to the Times.
4 OSU produced several emails that were responsive to both the UW and the OSU records
5 requests, but were never acknowledged or produced by the UW.

6 5.3 The OSU production included the following records within the scope of the UW request:

7 a. A September 4 email from Pac-12 attorney Maggy Carlyle to Dr. Harmon, Dr.
8 Aukerman and Pac-12 Commissioner Larry Scott with the subject line “Quidel next steps.” The
9 word “Quidel” was also in the body of the email (“Possible to invite Quidel rep to meet...”)

10 b. A September 4 email from Lynn Fister, director of the Pac-12 Conference’s
11 athlete health program, to Dr. Harmon and three other university doctors with the subject line
12 “Fw: PAC-12 testing agreement with Quidel.” The email contained a forwarded message from a
13 software company, Presagia, referencing the “agreement with Quidel.”

14 c. A September 3 email from Dr. Harmon to Dr. Aukerman and Ms. Carlyle stating
15 that the BD Veritor “is similar to the Quidel.”

16 d. Two September 3, 2020 email strings in which Pac-12 staff members forwarded
17 to Dr. Harmon and Dr. Aukerman the press materials for the Quidel partnership announcement
18 that day. “Quidel” appeared in the labels of all three attached documents as well as in the text of
19 the forwarded email.

20 e. An email string involving both Dr. Harmon and Dr. Aukerman with a “Quidel
21 Confidentiality Notice” at the bottom. The first email in the string was from Jeff Hunt, who does
22 public relations for Quidel, on August 30, 2020. The last email in the string was from Dr.

1 Harmon to Dr. Aukerman on August 31, 2020, discussing a spreadsheet in which she estimated
2 that 15,120 COVID tests a week would be needed.

3 5.5 The records described in paragraph 5.4 above were prepared, owned, used or retained by
4 the UW.

5 5.6 The UW could have located and produced records in response to Mr. Reicher's
6 September 30 request, but failed to do so.

7 5.7 The UW failed to conduct an adequate search for records responsive to Mr. Reicher's
8 September 30 request.

9 5.8 An adequate search by the UW would have located responsive records such as those
10 described above.

11 5.9 The Seattle Times requested identifiable public records.

12 CAUSE OF ACTION – PUBLIC RECORDS ACT

13 6.1 The allegations above are incorporated by reference herein.

14 6.2 The records requested by the Times are "public records" as defined by RCW 42.56.010(3).

15 6.3 The UW violated RCW 42.56.070(1) and RCW 42.56.080 by failing to promptly disclose
16 records upon request.

17 6.4 The UW unlawfully withheld public records, in whole or in part, in the absence of any
18 applicable exemption.

19 6.5 The UW failed to provide the fullest assistance and most timely possible action on the
20 plaintiff's records request in violation of RCW 42.56.100.

21 6.6 The UW failed to justify the withholding of requested records as required by RCW
22 42.56.210(3).

23 6.7 The UW violated the Times' right to inspect or copy public records.

1 6.8 The UW violated the Times' right to receive a response to the September 30, 2020 request
2 within a reasonable time.

3 6.9 The UW failed to conduct an adequate search. The search was not reasonably calculated to
4 uncover all requested records.

5 VII. REQUESTS FOR RELIEF

6 The Seattle Times Company respectfully requests the following:

7 1. An order for the defendant University of Washington to show cause, pursuant to RCW
8 42.56.550(1), why it denied the Times an opportunity to inspect or copy all non-exempt records
9 requested;

10 2. An order declaring that the defendant agency violated the Public Records Act;

11 3. An award of penalties of up to \$100 per day for each record unlawfully withheld from the
12 Times, pursuant to RCW 42.56.550(4);

13 4. An award of all costs, including reasonable attorney fees, as required by RCW
14 42.56.550(4); and

15 5. Such other relief as the Court deems proper.

16
17 Respectfully submitted this 20th day of January 2021.

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19 BY: s/ Katherine A. George
20 Katherine A. George
21 WSBA 36288
22 Johnston George LLP
23 2101 4th Ave., Suite 860
Seattle, Wash. 98121
kathy@johnstongeorge.com
Ph: 206 832-1820
Fax: 206 770-6393